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In The

Supreme Court of the United States

October Term, 1990

WYANDOTTE TRIBE OF OKLAHOMA,

Petitioner,

v.

STATE OF OKLAHOMA, EX REL. OKLAHOMA TAX COMMISSION

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

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RESPONDENT'S BRIEF IN OPPOSITION

REASONS WHY THE PETITION SHOULD BE DENIED

1. THE PETITIONER HAS NOT PRESENTED ANY NECESSARY REASON FOR THE SUPREME COURTS REVIEW.

Rule 10 of the Rules of the Supreme Court specify certain reasons which warrant Supreme Court review of a lower court decision. The Petitioner must explain why review should be granted in terms of a conflict of opinion between United States court of appeals, conflict with a state court of last resort, or a departure from the accepted and usual course of judicial proceedings as to call for Supreme Court review.

Review could also be granted if a lower court decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court.

None of these reasons are cited by the Tribe in its petition. The Tribe's argument for review is that the Tenth Circuit opinion is wrong. Of course the Tenth Circuit opinion in this case was based on this Courts opinion in *Oklahoma Tax Commission v. Graham,* 489 U.S. 838 (1989). The *Graham* case is factually indistinguishable from the case at bar and is controlling authority upon which the Tenth Circuit opinion below is firmly grounded. However, the Tribe sidesteps that inconvenience by reporting in its petition that the *Graham* opinion was "incomplete" and therefore offers the present case as an opportunity for this Court to correct itself. The only reason offered by the Tribe for its petition is that the Tenth Circuit opinion is wrong and the decision of this Court in *Graham* is wrong and should be re-decided.

A petition for certiorari should explain why it is vital that the question involved be decided finally by the Supreme Court. If it only succeeds in demonstrating that the decision below may be erroneous, it has not fulfilled its purpose. In this case the questions presented have been finally decided by this Court in the *Graham* decision. This case can serve no further purpose to advance the law that has already been announced. This is not an appropriate case for review by this Court. Furthermore, this case was correctly decided by the Tenth Circuit based on well-established principles of federal civil procedure.

2. THE DECISION BELOW WAS CORRECTLY DECIDED IN CONFORMITY WITH CONTROLLING LAW.

This Court's ruling in *Graham* explained that, except as otherwise expressly provided by act of Congress, a case is not properly removed to federal court unless it might have been brought there originally. 28 U.S.C. §1441(a). In the present case, as in *Graham,* the sole alleged basis of original federal jurisdiction is 28 U.S.C. §1331, giving district courts "original jurisdiction of all civil actions arising under the Constitutions, laws, or treaties of the United States." The presence or absence of federal

question jurisdiction is governed by the "well-pleaded complaint" rule. Whether a case is one arising under federal law in the sense of the jurisdictional statute must be determined from what necessarily appears in the plaintiffs statement of his own claim in the bill of declaration, unaided by anything alleged in anticipation or avoidance of defenses which it is thought the defendant may interpose.

The petition filed by the Commission against this Tribe in Ottawa County District Court is reprinted in the Appendix to this Brief for this Court's review to determine a possible federal claim. The petition is similar to the one filed by the Commission in the *Graham* case. The Petition alleges the Tribe committed violations of State tax laws which are actionable under State law. The Petition is in no respect based on any right granted or reserved by any federal law or statute. There is simply no federal question upon which the Commission's claim is based.

The Tribe does raise defenses to the Commission's claims that are based on federal questions. However, this Court ruled in *Graham* that " . . . it has long been settled that the existence of a federal immunity to the claims asserted does not convert a suit otherwise arising under state law into one which, in the statutory sense arises under federal law." The Tribe asserts in its petition that any case which comes under the rubric of "Indian law" is necessarily a federal case since the field of "Indian law" has been completely preempted by federal law. This Court rejected this argument in *Graham* and found that Congress has expressly provided by statute for removal when it desired federal courts to adjudicate defenses based on federal immunities. Neither the parties nor the courts below have suggested that Congress has statutorily provided for federal court adjudication of tribal immunity notwithstanding the well-pleaded complaint rule.

The State District Court, and on appeal the State Supreme Court, are courts of general jurisdiction which are entirely competent to pass judgment on any and all federal defenses raised by the Tribe, and are, in that regard, bound by all applicable decisions of this Court. Any adverse decision from the State Court system may of course, be petitioned for review in this Court in the usual manner, in which the Tribe is evidently familiar. The merits of the Tribes federal defenses must be heard in State court.

CONCLUSION

This case is not appropriate for Supreme Court review because the opinion of the Tenth Circuit is not in conflict with opinions of other appellate courts nor of opinions of this Court. The questions raised in the Tribe's petition has been disposed of in the *Graham* decision, and based on that decision, the Tenth Circuit made a correct ruling in this case. The petition for writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

IN THE DISTRICT COURT OF OTTAWA COUNTY

STATE OF OKLAHOMA

STATE OF OKLAHOMA, ex rel, OKLAHOMA TAX COMMISSION	)	
Plaintiff,	)	
-vs.-	)	CASE NO. C-86-549
WYANDOTTE TRIBE OF OKLAHOMA a Federally Chartered Corporation,	)	
Defendant.	)	

PETITION

COMES NOW the State of Oklahoma, ex rel the Oklahoma Tax Commission, and for its cause of action against the Wyandotte Tribe of Oklahoma, a Federally Chartered Corporation, herein after called Defendant, alleges and states as follows:

(1) The Defendant is a federally chartered corporation organized pursuant to section 3 of the Act of June 26, 1936 (49 Stat. 1967) (codified as 25 U.S.C. 503), with its offices and principle place of business located within Ottawa County, Oklahoma.

(2) The Defendant operates a business, known as Wyandotte Tribe Tu.le Shop, within Ottawa County, Oklahoma on a tract of land more particularly described as follows:

> That part of the North half (N 1/2) of the Southwest Quarter (SW 1/4) of Section 21, Township 27 North, Range 24 East, lying South of Highway 60 in Ottawa County, Oklahoma.

(3) The Defendant, its agents, servants and employees have sold, and continue to sell, at retail, a large quantity of cigarettes to the general public from said location. The State cigarette excise taxes have not been paid on said cigarette sales by reason of the said Defendant's refusal to purchase and affix cigarette excise tax stamps to the individual packages of cigarettes, all in violation of State law.

(4) The Defendant has failed and refused to file any reports with the Oklahoma Tax Commission regarding the receipt and sale of unstamped cigarettes as is required by State law.

(5) The Defendant has failed and refused to obtain from the Oklahoma Tax Commission a license to sell cigarettes as is required by State law.

(6) The Defendant, its agents, servants and employees have sold, and continue to sell, at retail, cigarettes and other products to the general public from said location, said sales being subject to Oklahoma sales taxes.

(7) The Defendant has failed and refused to collect and remit State sales taxes on said sales, and Defendant has further failed and refused to file any sales tax reports with the Oklahoma Tax Commission, all in violation of State law.

(8) The Defendant has failed and refused to obtain from the Oklahoma Tax Commission a permit to conduct business at the said location as is required by State law.

(9) The actions of the Defendant constitute a continuing violation of the laws of the State of Oklahoma, said violation constitutes irreparable injury to the State and its citizens, for which Plaintiff is entitled to injunctive relief.

WHEREFORE, Plaintiff prays for an Order of the Court:

Permanently enjoining and restraining Defendant, its agents, servants and employees, from receiving or selling within this State untaxed and unstamped cigarettes and other products in violation of the

laws of the State of Oklahoma; and, until all taxes now due have been remitted in full to the State of Oklahoma; and, until such reports as are required by State law have been filed with the State of Oklahoma; and, until said Defendant has obtained a license to conduct business from the Oklahoma Tax Commission; and, until said Defendant has obtained a retail license from the Oklahoma Tax Commission for the sale of cigarettes and tobacco products; and

PLAINTIFF FURTHER PRAYS that said Defendant, its agents, servants and employees be preliminary enjoined from selling, within this State, any products upon which State sales taxes are not collected and remitted, and from processing or selling within this State any untaxed and unstamped cigarettes and tobacco products in violation of the laws of the State of Oklahoma, until a hearing can be held on Plaintiff's request for a permanent injunction; and,

PLAINTIFF FURTHER PRAYS that a Temporary Restraining Order be issued forthwith temporarily restraining said Defendant, its agents, servants and employees from selling, within this State, any products upon which State sales taxes are not collected and remitted, and from selling untaxed and unstamped cigarettes and tobacco production in violation of the laws of the State of Oklahoma, until a hearing can be held on Plaintiff's request for a preliminary injunction.

OKLAHOMA TAX COMMISSION

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VERIFICATION OMITTED